88-1823

Supreme Court, U.S.
FILED
APR 29 1989
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NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD GLADDEN,

Petitioner

VS.

RANDY W. ROACH, ET AL.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Don Gladden
Texas Bar No. 7991000
LAW OFFICES OF DON GLADDEN
P. O. Box 50686
Fort Worth, Texas 76105
817-531-3667

May 2, 1989 ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Does a law enforcement officer's use of physical violence and other deliberate means to compel a person to verbally disclose true name and address during the post-arrest booking process, violate the Fifth Amendment privilege against self-incrimination notwithstanding an absence of subjective intent on the officer's part to secure incriminating information?

2. Does charging a person with a criminal offense under Texas Penal Code Section 38.02 for asserting the Fifth Amendment privilege against self-incrimination after lawful arrest, and requiring a person so charged to post cash bond to ensure appearance at criminal trial on that alleged offense, unconstitutionally impose a cost on assertion of that privilege?

3. Under the case or controversy requirement of Article III, is a Plaintiff who seeks to enjoin municipally authorized enforcement of a State law which has violated his Fifth Amendment privilege against self-incrimination, required to prove standing by demonstrating he is "more likely than others" to again suffer the violation complained of by Petitioner?

LIST OF PARTIES

RICHARD GLADDEN, Petitioner

Respondents

RANDY W. ROACH;
JOE R. WADDILL (individually and in his official capacity as jail booking and processing lieutenant for Respondent City of Denton);
HUGH LYNCH (in his official capacity as Chief of Police for Respondent City of Denton);
CITY OF DENTON, TEXAS, and
THE STATE OF TEXAS

The remaining parties below whom Petitioner views as no longer having an interest in the present proceeding are:

Howard Watt
James Dotson
Norman Meryl Calvert
David Stewart
Don Britt
Gary Patton
Phylis Morris
Walter Hochheim
Glen Smithers

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I. The Fifth Circuit's holding that the absence of a police officer's subjective intent to secure incriminating disclosures is determinative of whether Petitioner was "compelled" in violation of the Fifth Amendment, directly conflicts with the decisional law of the First Circuit, and is contrary to recent decisions of the Supreme Court construing the Fifth Amendment rights of persons arrested. 12

II. The Fifth Circuit's decision adverse to Petitioner's Fifth Amendment claims offers the Court an exceptional vehicle with which to supply urgently

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needed affirmation of the Fifth Amendment restraints which limit the activities of law enforcement officers during the booking process. 17

III. The Fifth Circuit's holding that Petitioner lacks Article III standing to obtain prospective equitable relief because he is not "more likely than other people" to be subjected to enforcement of Texas Penal Code Section 38.02 as applied, establishes a constitutional standard of standing which unduly restricts the federal judicial power to enjoin use of ex officio procedures prohibited by the Fifth Amendment. 21

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that Court's February 8, 1989 Judgment and Order in this proceeding.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit from which review is sought, are reported at 864 F.2d 1196 (5th Cir. 1989), and are attached as Appendix A to this Petition.

The Judgment and Memorandum Opinion of the United States District Court for the Eastern District of Texas from which Petitioner appealed, are not reported, but are attached as Appendix B of this Petition.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the Judgment from which review is sought February 8, 1989. Jurisdiction is now conferred upon this Court by 28 U.S.C. Section 1254(1).

STATUTES AND RULES INVOLVED

Section 1983, Title 42, United States Code provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

Texas Penal Code Annotated Section 38.02 (Vernon 1974), at the time enforced against the Petitioner by Respondents provided:

> "Sec. 38.02. Failure to Identify as Witness.
>
> "(a) A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

"(b) An offense under this section is a Class C misdemeanor."

The pertinent portion of the present Texas Penal Code Annotated Section 38.02 (Vernon February, 1989), as amended in 1987 and which Petitioner seeks to have Respondents enjoined from enforcing in the future, provides:

"Section 38.02. Failure to Identify.

"(a) A person commits an offense if he intentionally refuses to report or give his name, residence address or date of birth to a peace officer who has lawfully arrested the person and requested the information."

STATEMENT OF THE CASE

Petitioner's request for review in this Court relates solely to the events surrounding his arrest of April 23, 1983. In addition to the facts articulated by the Court of Appeals, 864 F.2d at 1197, (App. A-3-4) the Petitioner would respectfully submit the following:

On November 16, 1984, Petitioner filed the instant civil rights suit in the District Court for the Eastern District of Texas claiming damages from Respondent Roach under the Fifth Amendment for injuries caused by Roach's deliberate efforts at the North Texas State University police station which Petitioner alleged were designed to break Petitioner's expressed will to exercise his right to silence.[1] The actions complained of included an assault by Roach which Petitioner alleged was an attempt by Roach to dissuade Petitioner from continuing to exercise his right to

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[1]Petitioner's First Amended Complaint, paragraph 26.

silence.[2] In addition to this claim, Petitioner alternatively brought a Due Process/excessive force claim under the Fourteenth Amendment with regard to Roach's actions.

Petitioner also alleged Respondents Roach, Waddill and City of Denton unconstitutionally charged him with a criminal offense under Texas Penal Code Section 38.02 for exercising the right to silence guaranteed by the Fifth Amendment, and that Respondents further violated this right by requiring him to post a $100 cash bond for release on that charge, twice the amount required for the

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[2]In the District Court, Respondent Roach testified his motivation for causing the handcuffed Petitioner to end up on the floor was his perceived need for an additional "pat down" search of Petitioner. Were this true, it would appear to have been the third such "pat down" search conducted. To accomplish this, Roach testified he "buckled" the Petitioner's knees, "folded" Petitioner back over, and then "laid" the Petitioner on his back. (TR, 360-61)

underlying public intoxication charge, after his identity had been independently discovered. Petitioner sought nominal damages from Respondents Waddill and City of Denton for their enforcement of Section 38.02 in this manner, and prospective equitable relief in the form of an injunction prohibiting all Respondents from again enforcing Section 38.02 as applied.

On the trial of the case, the District Court denied Respondent Roach's motion for directed verdict on Petitioner's alternative Due Process claim for use of excessive force, but granted each of the Respondents' motions for directed verdict with respect to Petitioner's primary claims brought under the Fifth Amendment, ruling from the bench:

> "...the Court has concluded, as a matter of law, that the right to remain silent does not entitle an individual to refuse to identify

> himself to police officers when lawfully detained by the police officers. Such matters as your name are administrative in nature and are not encompassed in the Fifth Amendment right against self-incrimination or the Miranda right to remain silent, even though the [Petitioner] may have believed otherwise in good faith." (TR, 1044)

Accordingly, the District Court submitted Petitioner's excessive force claim to the jury, instructing the jury that to recover damages Petitioner was required to show that Roach's actions represented more than "unwise excess of zeal," and were such as to amount to "an abuse of official power that shocks the conscious." The jury returned a verdict in favor of Respondent Roach on this issue. (TR, 1047-48)

In the memorandum opinion accompanying its final judgment entered October 16, 1987, the District Court reaffirmed its bench ruling with regard to Petitioner's

Fifth Amendment claims, but, apparently conceding the constitutional distinction between the "shocking to the conscious" standard for Petitioner's Due Process claim, and the standard provided by this Court for Fifth Amendment violations,[3] the District Court expressly acknowledged:

> "[i]f plaintiff has a constitutional right to stand mute in the face of proper police questions about his identity after lawful arrest...plaintiff may have been entitled to additional jury issues [with regard to his 'claims for damages']." (App. B-14 n.2)

Petitioner filed timely Notice of Appeal in the Fifth Circuit Court of Appeals November 9, 1987, and there contended that a verbal disclosure of name and address is a testimonial act,[4]

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[3]See e.g., Malloy v. Hogan, 378 U.S. 1, 7 (1964) (the Fifth Amendment inquiry "is not whether the conduct of state officers...was shocking").

[4]Brief of Appellant, 14.

that Petitioner properly invoked the privilege,[5] that it is exclusively for a judicial officer and not a law enforcement officer to consider, decide, or otherwise assess the validity of an assertion of the privilege,[6] and that under this Court's decision in Oregon v. Elstad, 470 U.S. 298, 312 (1985), Roach should have been found liable under Petitioner's Fifth Amendment claim for any "physical violence or other deliberate means calculated to break the [Petitioner's] will" to remain silent.[7] Petitioner also raised again his claim for nominal damages and injunctive relief

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[5]Appellant's Reply Brief to Appellees State of Texas and Roach, 10.

[6]Appellant's Reply Brief to Appellees State of Texas and Roach, 7-8.

[7]Appellant's Reply Brief to Appellees State of Texas and Roach, 11.

with respect to the enforcement of Section 38.02.

The Court of Appeals affirmed the Judgment of the District Court, and additionally held that Petitioner did not have standing to seek prospective equitable relief as to the enforcement of Section 38.02 as applied. The Court of Appeals did not, however, rule on what Petitioner argued was the appropriate post hoc inquiry, if any, into the incrimination element of his claim; that is, whether or not at the time Petitioner interposed the privilege against self-incrimination, the possibility of the disclosures being used for a criminal prosecution was "so improbable that no reasonable man would suffer it to influence his conduct." Brown v. Walker, 161 U.S. 591, 599-600 (1896). The

instant petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's holding that the absence of a police officer's subjective intent to secure incriminating disclosures is determinative of whether Petitioner was "compelled" in violation of the Fifth Amendment, directly conflicts with the decisional law of the First Circuit, and is contrary to recent decisions of the Supreme Court construing the Fifth Amendment rights of persons arrested.

The Fifth Circuit's decision creating an exception directly under the Fifth Amendment permitting police use of actual compulsion "to secure the biographical data necessary to complete the booking process," 864 F.2d at 1198 (App. A-7), conflicts diametrically with the First Circuit's decision in United States v. Downing, 665 F.2d 404 (1981). In Downing, the First Circuit expressly

rejected the argument relied upon by the Fifth Circuit here, stating:

> "Given the unavoidable coerciveness of police questioning after an accused has requested counsel, we decline the government's invitation to create a broad exception to the Fifth Amendment for police questions asked without 'investigative intent' or pursuant to 'required administrative procedures.'" Id., 665 F.2d at 406-07.

Recent decisions of the this Court almost conclusively establish that the First Circuit is correct when it finds the subjective intent of the police of minimal probative value when measuring "compulsion" for Fifth Amendment purposes. See e.g., Moran v. Burbine, 475 U.S. 412, 423 (1986) ("...whether intentional or inadvertant, the state of mind of the police is irrelevant" when determining whether privilege voluntarily waived); Oregon v. Elstad, 470 U.S. 298, 312 (1985) (indicating Fifth Amendment

will require suppression of both statements, as well as fruits of statements, when police have used "physical violence or other deliberate means calculated to break the suspect's will" to remain silent).

Only last Term the Court reaffirmed its prior holdings to the effect "that the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." Doe v. United States, __ U.S. __, __ n.12, 101 L.Ed.2d 184, 199 n.12, 108 S.Ct. 2341, 2349 n.12 (1988). The unprovoked physical abuse suffered by Petitioner certainly states a claim under this standard.

While the Court has several times come near deciding the question presented, it has thus far provided the lower courts

with little guidance in defining the contours of the Fifth Amendment in the booking context. In California v. Byers, 402 U.S. 424 (1971) the Court upheld a California law which made it a crime to leave the scene of an auto accident without giving one's name and address. No single rationale gained a majority of the Court however. Justice Harlan, whose concurring opinion established a majority for the result, distanced himself from the broader grounds articulated by the plurality, and pointedly emphasized that the case before the Court differed from the typical Fifth Amendment case where, as in the instant case, the privilege has been timely invoked by the witness and the judge is therefore in a position to assess the witness's claim, and thus is enabled to offset "the tendency for the privilege to become an absolute right not

to disclose any information at all." Id., 402 U.S. at 440 (Harlan, J., concurring). Consequently, the Byers Court did not reach the question presented in the instant case of whether the privilege may be validly claimed during the booking procedure.[8]

At the present time it appears at least three Members of the Court have concluded an arrestee may validly claim the privilege in response to requests for disclosures such as these. Kolender v. Lawson, 461 U.S. 352, 368 n.6 (1983)

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[8]Although the distinction noted here was not discussed, The Chief Justice has very recently expressed the view that Byers rested primarily, but not entirely, on the outcome of an objective inquiry into governmental purpose or intent. See Baltimore City Dept. of Soc. Services v. Bouknight, No. A-494, 102 L.Ed.2d 682, 685, 109 S.Ct. 571, 572-73 (1989) (Rehnquist, C. J., in chambers sitting as Circuit Justice) cert. granted, (No. 88-1182, April 3, 1989). In the instant case, the asserted overriding governmental interest is in avoiding the inconvenience of permitting an arrestee to present his claim of privilege to a neutral magistrate before compulsion is applied.

(Brennan, J. concurring); Maryland v. Garrison, 480 U.S. 79, 100 n.10, (1987) (opinion per Justice Blackmun, with whom Justices Brennan and Marshall joined, dissenting).

II. The Fifth Circuit's decision adverse to Petitioner's Fifth Amendment claims offers the Court an exceptional vehicle with which to supply urgently needed affirmation of the Fifth Amendment restraints which limit the activities of law enforcement officers during the booking process.

Although Petitioner has brought his claims pursuant to the more fundamental guarantee provided by the Fifth Amendment, as opposed to the prophylactic protections supplied by the Miranda doctrine, he recognizes that it may be of greater importance from the Court's perspective that Texas Penal Code Section 38.02 unavoidably conflicts with the implementation of the Miranda rule

mandated by the Court's decision in Berkemer v. McCarty, 468 U.S. 420 (1984). There, the Court held that because an accused who had been arrested for a misdemeanor was not informed of his right to silence at the moment of arrest, his incriminating answers obtained while the officer sought answers for inclusion in an admistrative report were not admissible. Id., 468 U.S. at 424.

Notwithstanding the Berkemer decision, Respondents State of Texas, City of Denton and Roach have successfully contended in the Court below that the desire for clarity expressed in that opinion is not implicated so long as suspects are not questioned about the alleged crimes supporting their arrests. Accepting this argument, the Fifth Circuit rejected Petitioner's claim that Texas Penal Code Section 38.02 as applied

imposed an unconstitutional cost on his assertion of the right to silence by stating simply that "if no such privilege exists, then clearly the statute does not impose a cost on the exercise of it." 864 F.2d at 1199. (App. A-12-13) While Petitioner does not dispute this logic, he respectfully notes that if, as he contends, the Fifth Amendment does convey him a right to remain silent when in reasonable fear that an answer could possibly be used in a future criminal trial against him, it most assuredly follows that the Respondents' enforcement of Section 38.02 against Petitioner unconstitutionally imposed a cost on that right under the Court's decisions in Garrity v. New Jersey, 385 U.S. 493, 499-500 (1967), and Spevack v. Klein, 385 U.S. 511, 515 (1967) (plurality opinion).

At the present time, the Court of Appeals for the First Circuit and District of Columbia have held that a right to silence exists in the booking context which must be knowingly, voluntarily, and intelligently waived. United States v. Downing, supra; Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968). Several of the remaining Courts of Appeal however, have permitted questioning, but not violence, under circumstances in which the police have propounded questions without intent to secure incriminating responses. See United States v. Taylor, 799 F.2d 126, 129-30 (4th Cir. 1986) (Winter, C.J., dissenting) (listing cases). By resolving the incongruity which exists between Section 38.02 and the Fifth Amendment, and by condemning Respondent Roach's assault on Petitioner for

exercising the right to silence, the Court would provide urgently needed constitutional guidelines for all police officers who must act during the most compulsive moments for an accused who has been arrested.[9]

III. The Fifth Circuit's holding that Petitioner lacks Article III standing to obtain prospective equitable relief because he is not "more likely than other people" to be subjected to enforcement of Texas Penal Code Section 38.02 as applied, establishes a constitutional standard of standing which unduly restricts the federal judicial power to enjoin use of ex officio procedures prohibited by the Fifth Amendment.

Last Term in Honig v. Doe, __ U.S. __, __, 98 L.Ed.2d 686, 108 S.Ct. 592, (1988) the Court referred to the "more likely

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[9]Justice White has recently noted the police free-for-all which is occurring during the booking process. See, Lewis v. Florida, __ U.S. __, 100 L.Ed.2d 612, 108 S.Ct. 2025 (1988) (White, J., dissenting from denial of petition for writ of certiorari).

than others" rule for standing, relied upon by the Fifth Circuit here, as merely reflecting the Court's general unwillingness "to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." Id., 98 L.Ed.2d at 704, 108 S.Ct. at 602. The Court emphasized however, that the reason the evidence of past injury alone was insufficient to provide standing in Los Angeles v. Lyons, 461 U.S. 95 (1983), was that in Lyons the City had not "authorized police officers to act in [the] manner" sought to be enjoined. Honig, supra, 98 L.Ed.2d at 706, 108 S.Ct. at 603 (emphasis the Court's).

In the instant case, unlike in Lyons, the Respondent City has not only acknowledged and defended its application of Texas Penal Code Section 38.02 to

Petitioner, but has expressed its intention to continue to enforce that statute as applied. In the Court of Appeals Petitioner argued that these and other factors established "a genuine threat of enforcement" sufficient to provide him standing to enjoin the municipally authorized enforcement complained of by Petitioner. Nonetheless, the Court of Appeals held that the "more likely than others" standard applied to the instant case, and found Petitioner had not met this burden. 864 F.2d at 1198-99 (App. A-9-10).

Application of the "more likely than others" standard to requests for relief such as appears in the instant case is inappropriate for the simple reason that it permits States and municipalities to continue practices which have been adjudicated unconstitutional by a federal

court. Under these circumstances, it cannot seriously be argued that any legitimate interest in maintaining a proper federal-state balance supports the Fifth Circuit's decision. Nor can application of this more stringent standard for standing be supported by reference to the original intent of the drafters of Article III. Lord Coke, whose influence on the colonies has previously been noted by the Court, Payton v. New York, 445 U.S. 573, 594 n.36 (1980), certainly did not view his equitable power to be so limited when prohibiting use of ex officio procedures.[10] The Fifth Circuit's

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[10]See Levy, Origins of the Fifth Amendment, 255 (1968) (quoting Coke: "it is very clear, they cannot proceed so, and I will satisfie them herein for the time to come") (emphasis added). In another context, the Court has found the use of the writ of prohibition in England highly relevant when considering the permissible scope of prospective equitable relief under 42 U.S.C. 1983. Pulliam v. Allen, 466 U.S. 522, 534 (1983).

decision thus seems to be supported only by its misguided interpretation of Los Angeles v. Lyons.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the February 8, 1989 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LAW OFFICES OF DON GLADDEN
P. O. Box 50686
Fort Worth, Texas 76105
817-531-3667

By: Don Gladden
DON GLADDEN

ATTORNEY FOR PETITIONER

RICHARD GLADDEN, Plaintiff-Appellant,
Cross-Appellee,

v.

RANDY W. ROACH (Officer), et al.,
Defendants-Appellees,

and

City of Denton, Defendant-Appellee
Cross-Appellant.

No. 87-6173

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Feb. 8, 1989

Appeals from the the United States District Court for the Eastern District of Texas.

Before GEE, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

OPINION

GEE, Circuit Judge:

Richard Gladden filed suit under 42 U.S.C. Section 1983, alleging that

Officer Randy Roach of the North Texas State University (NTSU) Police, members of the Police Department of Denton, Texas, the City of Denton and others, had violated his rights under the First, Fourth, Fifth, and Fourteenth Amendments. The complaint also contained state law claims. The violations alleged in the complaint arose out of two separate arrests of Gladden, one by NTSU and one by Denton police officers. After a trial, several interrogatories were submitted to the jury, which returned a verdict for the defendants on all of the interrogatories.

Both parties made motions for judgment, and in a memorandum opinion the district court found that Gladden's civil rights had been violated by his detention for 87 hours after his September 15, 1984, arrest. The district court awarded

Gladden nominal damages of $1.00 for the violation.

On April 23, 1983, NTSU police officer Randy Roach arrested Gladden for public intoxication. After arresting Gladden, Roach transported him to the university police station for booking. Roach, in an effort to fill out the arrest report, asked Gladden for his name, address, and date of birth. Gladden refused to answer the questions, asserted that he had a right to remain silent, and requested that he be allowed to call his attorney. Roach informed Gladden that if he continued to refuse to answer, he would be charged, under Texas Penal Code Article 38.02, with failure to identify himself to a police officer. Gladden attempted to use the phone without permission and was physically restrained by Officer Roach. Roach then transported

Gladden to the Denton Municipal Jail, where Gladden was charged with public intoxication and failure to identify himself. Gladden posted a cash appearance bond. The charged of failure to identify was dismissed on Gladden's motion, and a jury found Gladden not guilty of the public intoxication charge.

On September 15, 1984, Denton Police Officer Britt arrested Gladden. The arrest occurred when officers attempted to shut down a loud party about which they had recieved at least two complaints. Gladden, who was a guest at the party, interfered with the officers and Britt arrested him for public intoxication and disorderly conduct. Gladden contends that Britt lacked probable cause for the arrest.

Following the arrest, Gladden was transported to the Denton police station

where he again refused to answer when asked his name, address, and other booking information. Two of Gladden's friends came to the jail and posted $200 bond to free him. After the officers completed the necessary paperwork to free Gladden, they retrieved his personal property to return to him, but Gladden refused to accept the bond. Gladden was held for 87 hours before he was arraigned before a magistrate and released on a $400 surety bond.

Gladden contends that the district court erred in holding that he did not have an absolute right to remain silent after his arrest on April 23, 1983. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself...." U.S. Const. Amend. V. The Supreme Court held in Miranda v. Arizona, 384 U.S. 436,

474, 86 S.Ct. 1602, 1627-1628, 16 L.Ed.2d 694 (1966), that once a defendant in custody asks to speak with a lawyer all interrogation must cease until a lawyer is present. The Miranda safeguards apply whenever a person in custody is interrogated, either by express questioning or its functional equivalent. Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297 (1980). Interrogation is defined as words or actions that the police should know are reasonably likely to elicit an incriminating response from the suspect. Id.

We held in United States v. Menichino, 497 F.2d 935, 941 (5th Cir.1974) that biographical questions, which are part of the booking routine and are not intended to elicit damaging statements, are not interrogation for Fifth Amendment

purposes. Thus, it is permissible for officers to ask straightforward questions to secure the biographical data necessary to complete the booking process. Other circuits have held that questions seeking biographical information for booking purposes do not constitute interrogation or its functional equivalent. See United States v. Morrow, 731 F.2d 233, 237 (4th Cir.), cert. denied, 467 U.S. 1230, 104 S.Ct. 2689, 81 L.Ed.2d 883 (1984); United States v. Kane, 726 F.2d 344, 348-49 (7th Cir.1984); United States v. Sims, 719 F.2d 375, 378-79 (11th Cir. 1983), cert.denied, 465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984).

While it is conceivable that questions about a person's identity or residence could be incriminating, or lead to incriminating information, on the facts of this case such statements were not

incriminating. Identity was not an element of either the crime of public intoxication or that of disorderly conduct. The district court did not err, therefore, in holding that Gladden did not have an absolute right to remain silent following his arrest.

Gladden also asserts that the district court erred in ruling that Texas Penal Code Article 38.02 as applied to him on April 23, 1983, did not violate the Fourth,[1] Fifth, and Fourteenth Amendments. Gladden asks this court to declare Article 38.02 unconstitutional as applied to the plaintiff and to grant him injunctive relief from having the statute enforced against him in the future.

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[1]Gladden mentions the Fourth Amendment, but does not brief the issue. Issues stated but not briefed need not be considered by the court. Morrison v. City of Baton Rouge, 761 F.2d 242, 244 (5th Cir.1985).

The State of Texas argues that Gladden lacks standing to seek injunctive relief. This contention has merit. One seeking injunctive relief must demonstrate a real and immediate threat that he will be subject to the behavior which he seeks to enjoin. It is not sufficient for the plaintiff to speculate that he will be subject to injurious conduct if the practice is continued or the law remains on the books. City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

Gladden was charged with a violation of Article 38.02 only at the time of his April 23, 1983, arrest. He was not charged with violating the statute the other time he was arrested nor has he demonstrated that he is realistically threatened by the statute. The record does not suggest that Gladden is any more

likely than other persons to be subjected to a charge of failure to identify. Additionally, the statute has been amended since Gladden's arrest. At the time of Gladden's arrest, Art. 38.02 made it an offense for a person "lawfully stopped" by an officer to fail to identify himself to the officer. The statute was amended, effective September 1987, to require a lawful arrest before identification is required. Nothing in the record suggests that Gladden is more likely to be arrested than other people. See Brown v. Edwards, 721 F.2d 1442, 1446-47 (5th Cir.1984). Since he lacks standing, Gladden cannot receive the equitable relief he requests.

Gladden asserts that City of Houston v. Hill, 482 U.S. 451, ___, n. 7, 107 S.Ct. 2502, 2508 n. 7, 96 L.Ed.2d 398, 410, n. 7 (1987), is analogous to his situation

and provides him with standing. In Hill, a municipal ordinance made it unlawful for a person to interrupt a police officer in the performance of duty. Hill, a "gay" activist, had been arrested four times for violating the ordinance; the last arrest involved only verbal "interference." Hill sought an order permanently enjoining enforcement of the ordinance. At the hearing on the injunction, Hill testified that he planned to continue to interrupt "nonviolently any illegal police activity" he observed at any time, under any circumstances. 107 S.Ct. at 2505 n.1. The Supreme Court concluded that Hill's stated intention to interfere meant he confronted a genuine threat that the statute would be enforced against him. Id. n. 7. Gladden asserts that his statement that he would sue officers

Roach and Hooper for their allegedly illegal conduct "if it takes me the rest of my life," is akin to the the statement in Hill. This argument is meritless. Gladden cannot use his isolated statement of April 23, 1983, to elevate himself to the role of "citizen provacateur," Hill, 107 S.Ct. at 2508 n. 7, so as to accord him standing.

Insomuch as Gladden's second assignment of error seeks to overturn the trial court's decision that the ordinance was not unconstitutionally applied to him on April 23, 1983, this argument does not differ from his first assignment of error. The basis of Gladden's argument on this point is that the Article 38.02 imposes a cost on his assertion of his Fifth Amendment privilege to remain silent; but if no such privilege exists, then clearly the statute does not

unconstitutionally impose a cost on the exercise of it. Consequently, even had the court found that Gladden had standing to request injunctive relief, it properly denied it.

Gladden also asserts that Officer Britt lacked probable cause to arrest him on September 15. That arrest occurred after Gladden interfered when officers attempted to shut down a loud party. The arrest was for disorderly conduct and public intoxication. Gladden argues that the court's instruction on the elements of the offense of disorderly conduct failed to properly define that offense, so that the jury could determine whether Officer Britt had probable cause to arrest him on that charge.

The evidence introduced at trial, however, was sufficient for the jury to conclude that Officer Britt had probable

cause to arrest Gladden for public intoxication.[2] Probable cause to arrest exists when the arresting officer, at the time of the arrest, has knowledge sufficient to warrant a prudent man in believing that the person arrested had committed or was committing an offense. United States v. Bertram, 719 F.2d 735, 738 (5th Cir.1983). Even assuming that the district court erred in its instruction on the disorderly conduct ordinance, the jury could have concluded from the evidence that Officer Britt's arrest of Gladden for public intoxication was supported by probable cause. While Gladden contests this finding, he presents no evidence to the contrary. The officer only needed probable cause to

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[2]Gladden states that he is not conceding probable cause for public intoxication, but submits no argument on the issue.

believe that one offense had been committed to arrest Gladden. The officer had such probable cause.

Further, to the extent that the district court's instruction on disorderly conduct may have been erroneous, the error was favorable to Gladden. The ordinance defined disorderly conduct as one of seven designated acts causing or designed to cause a public danger, alarm, disorder, or nuisance. The seven acts are written in the disjunctive. The district court's instruction ran the seven together, perhaps creating the impression that a lawful order of dispersal by a police officer was a necessary predicate to any charge of disorderly conduct. There was, therefore, sufficient evidence to sustain the jury's finding that Officer Britt had probable cause to arrest Gladden.

Gladden contends that requiring a defendant arrested on a charge for which a period of incarceration is not provided as a penalty to post bond as a condition of release violates his constititonal due process rights. Gladden cites an unpublished opinion from the Eastern District of Virginia in support of this contention. In the Virginia case, Allen v. Burke, the district court held that, as to defendants who were unable to post bond, a requirement that a cash bond be posted for non-jailable offenses violated the due process and equal protection clauses. Here, however, unlike Allen, Gladden could have posted bond. He merely refused to do so, arguing that the requirement violated his due process rights.

The gist of Gladden's due process argument is that demanding that a

defendant post bond as a pre-condition for release following arrest on a non-jailable offense is "arbitrary, purposeless, excessive, without legitimate or rational goal, and is inherently punitive in its character." The purpose of requiring that a defendant post bail as a pre-condition of release following arrest is to insure the defendant's attendance at trial. The fact that the penalty which may be imposed at trial does not include incarceration is not, in and of itself, a guarantee that a defendant will appear for trial. As in any other case, requiring a defendant charged with a non-jailable offense to post bond insures that he will appear for trial. Gladden's argument that his due process rights were violated by requiring him to post bond is without merit.

Gladden assigns as error the district court's instruction to the jury on mitigation of damages. Gladden contends that the instruction should not have been given and alternatively, that, if the instruction was proper, it was improperly worded and prejudicial.

The court's instruction stated:

> You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to mitigate those damages, that is, to take advantage of an opportunity he may have had under the circumstances to reduce or minimize the loss or damage.
>
> So, in regard to plaintiff's arrest and detention on September 15, 1984, if you should find from a preponderance of the evidence that plaintiff failed to seek out or take advantage of an opportunity to be released from jail, that was reasonably available to him under all of the circumstances shown by the evidence, including the bail bond tendered by Robbie Robison and any opportunity his father may have had to obtain his release, if ye so find, than you should reduce the amount of his damages by the amount of any damages he could have avoided if he had taken advantage of such opportunity. (Emphasis added.)

Gladden's objection is that the instruction did not make it clear to the jury that only reasonable opportunities or reasonably available opportunities were to be considered for purposes of mitigation. The objection is meritless. The instruction made it clear to the jury that the duty to mitigate was not absolute, and that Gladden was only required to avail himself of reasonable opportunities to mitigate his damages.

Gladden asserts that the district court erred in failing to submit to the jury his common-law cause of action for false imprisonment. The district court did not instruct the jury on the elements of the state tort of false imprisonment, nor did it instruct the jury that separate damages for that tort might be available. Gladden also asserts that the district court erroneously instructed the jury

that the individual police officers had a good faith defense to false imprisonment. A reading of the instruction indicates that while the district court stated that they had a good faith defense, it appears that this was intended to relate solely to the section 1983 claim.

Under Texas law, the elements of false imprisonment are: "(1) willful detention; (2) without consent; and (3) without authority of law." H.E. Butt Grocery Co. v. Saldivar, 752 S.W.2d 701, 702 (Tex.App. 1988). The municipal defendants, citing Rains v. Corrigan Properties, Inc., 600 S.W.2d 895 (Tex.App. 1980) and Rains v. Crow, 601 S.W.2d 774 (Tex.App.1980), assert that they are immune from liability for false imprisonment because the initial arrest of Gladden was lawful. The municipal defendants misapprehended the cause of

action. The detention of Gladden beyond 24 hours was found to be unreasonable; therefore, the officers have no defense of having detained Gladden under lawful authority. Nor do the officers have a general good-faith defense to the state tort of false imprisonment. Douthit v. Jones, 619 F.2d 527, 537 (5th Cir.1980).

Texas courts have recently applied the official immunity doctrine to shield police officers from liability for actions taken during the course of criminal investigation. Wyse v. Department of Public Safety, 733 S.Wd.2d 224, 227 (Tex.App.1986). Wyse stated that public officials whose actions are quasi-judicial or discretionary enjoy immunity, as long as they act with good faith within the scope of their authority. It cannot be argued that the officers were acting within the scope of

their discretionary authority in detaining Gladden without arraignment for beyond 24 hours. Therefore, the court should have submitted Gladden's false imprisonment claim to the jury. The court's error does not, however, require reversal or remand of this case.

The district court instructed the jury that as a matter of law Gladden's constitutional rights had been violated after 24 hours had expired without his being arraigned. Interrogatory No. 3 asked the jury what amount would compensate Gladden for injuries he sustained, if any, as a result of his being held in the city jail for more than 24 hours. The jury answered that no damages had been suffered. The damages, if any, on the false imprisonment would have been identical to those suffered as a result of the constitutional violation.

Since the jury awarded no damages, no remand is necessary.

The municipal defendants appeal the district court's denial of their request for an interrogatory inquiring whether Gladden goaded the officers into arresting him in order to set up a lawsuit. The municipal defendants objected to the district court's failure to submit such an interrogatory.

The city contends that Gladden goaded the officers into arresting him on September 15, 1984, in order to allow him to file suit. The city points to Gladden's March 1984 arrest, at which time he refused to post bond and his behavior on the evening of September 15, 1984, as indications that the events were a contrivance by Gladden. The city also notes Gladden's statement after his April 1983 arrest that he would do something

about illegal police conduct if it took the rest of his life. The municipal defendants contend that the rationale of Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) and Clark v. Bird, 354 F.2d 977 (1st Cir.), cert. denied, 384 U.S. 906, 86 S.Ct. 1341, 16 L.Ed.2d 359 (1966) should be extended to prevent defendants who "set up" their own arrests from recovering even nominal damages.

Pierson did not reach the general question whether a section 1983 plaintiff may be denied damages if he goaded or "set up" the defendant. It simply found that such a theory was inapplicable to the case before it. Pierson, 386 U.S. at 558, 87 S.Ct. at 1219-1220. In Clark, testimony revealed that plaintiff had arranged, for no discernible reason, to be arrested. The First Circuit refused

to allow the plaintiff to recover for his staged arrest. Clark, 354 F.2d at 977-78. While Clark may stand for the proposition that a defendant may not recover damages for a set-up arrest, the record does not support the application of the Clark theory to the facts of this case, since it does not appear that Gladden intended to be arrested.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RICHARD GLADDEN

v.

OFFICER RANDY W. ROACH, et al

CIVIL ACTION NO. S-84-220-CA

October 15, 1987

Before United States District Judge Paul Brown.

JUDGMENT

This action came on for trial before the Court and a jury with the undersigned presiding. The issues having been duly tried and the jury having duly rendered its verdict, and the Court having duly considered the issues of law, it is the Judgment of the Court as follows.

It is ORDERED, ADJUDGED and DECREED that plaintiff take nothing and that the action be dismissed on the merits regarding each of plaintiff's claims,

including the various requested injunctions, with the single exception of plaintiff's claim for damages arising out of his detention by defendant City of Denton for an impermissible period of time prior to being taken before a neutral magistrate following his arrest on September 15, 1984.

It is further ORDERED, ADJUDGED and DECREED that plaintiff recover $1.00 nominal damages against defendant City of Denton pursuant to the Court's finding that, as a matter of law, plaintiff's Constitutional rights were violated in being detained for an impermissible period of time prior to being taken before a neutral magistrate.

It is finally ORDERED, ADJUDGED and DECREED that the issue of attorney's fees be, and is hereby, severed for separate consideration by the Court.

Signed this 15th day of October, 1987.

/s/ Paul Brown
United States District Judge

MEMORANDUM OPINION

Plaintiff, Richard Gladden, brought this action against the City of Denton, Texas, and various police officers, judges, magistrates and clerks, alleging in part that under the United States Constitution an individual has an absolute right to remain silent when in the custody of police officers. The plaintiff contends that the attempts of the defendants to ascertain his identity violated this right and that Texas Penal Code Section 38.02, which makes it a criminal act for a person to refuse to give his name and address to a police officer who has lawfully stopped him and requested the information, is facially unconstitutional. This Court does not agree with either of these contentions.

I. Fifth Amendment

Under the circumstances before the Court, the ministerial questions posed by the defendants regarding the plaintiff's name and address were not incriminatory in a Fifth Amendment context. Disclosure of one's name and address, in a Fifth Amendment sense, is an essentially neutral act. California v. Byers, 91 S.Ct. 1535 (1971). Knowledge of an individual's identity may lead to further inquiry, that in turn leads to arrest and charge. The basis upon which the progression of an investigation depends, however, involves different and independent evidence. California v. Byers, 91 S.Ct. at 1541.

As articulated by the Supreme Court, "the [Fifth Amendment] privilege's application has been whether the claimant is confronted by substantial and 'real',

and not merely trifling or imaginary, hazards of incrimination." Marchetti v. United States, 88 S.Ct. 697, 702 (1968). This is so because the privilege against self-incrimination is grounded on a reasonable fear of danger of prosecution. United States v. Damiano, 579 F.2d 1001 (6th Cir. 1978). (Citing Hoffman v. United States, 71 S.Ct. 814 (1951)). The mere possiblity of incrimination is insufficient to defeat strong public policies in favor of disclosure of name and address information. California v. Byers, 91 S.Ct. at 1538.

Furthermore, the "right to remain silent", a creature of the Supreme Court's decision in Miranda v. Arizona, 86 S.Ct. 1602 (1966), applies only in situations involving custodial interrogation. Roberts v. United States, 100 S.Ct. 1358 (1980). The Miranda rule

does not contemplate that every question, word or act of a police officer constitutes interrogation. United States v. Booth, 669 F.2d 1231 (9th Cir. 1981). Words or actions on the part of the police normally attendant to arrest and custody and which are not reasonably likely to elicit an incriminating response do not fall within Miranda's definition of interrogation. Rhode Island v. Innis, 100 S.Ct. 1682 (1980). Other circuits have held that the questioning of a defendant for the purpose of taking basic personal information such as name and address does not constitute interrogation or its functional equivalent. United States v. Morrow, 731 F.2d 233 (4th Cir. 1984); United States v. Kane, 726 F.2d 344 (7th Cir. 1984). The Fifth Circuit, although in a different context, has unequivocally

endorsed the concept that questions constituting a straightforward attempt to secure biographical data necessary to complete booking procedures does not constitute interrogation within the Miranda context. United States v. Menichino, 497 F.2d 935 (5th Cir. 1974).

II. Fourth Amendment

The plaintiff further challenges Texas Penal Code Section 38.02 under the Fourth Amendment; in other words, the plaintiff contends that asking an arrested individual his name is an unreasonable search and seizure.

The traditional protection of individual rights afforded by the Fourth Amendment is the constitutional requirement that police intrusion be based upon probable cause. Dunaway v. New York, 99 S.Ct. 2248 (1979). In Terry v. Ohio, 88 S.Ct. 1868 (1968), however,

the Supreme Court established a narrow exception to that general rule by holding that an investigatory stop, a less intrusive detention than arrest, may be made based upon a reasonable "articulable suspicion" that the detainee either had committed or was about to commit a crime. Dunaway v. New York, 99 S.Ct. at 2254.

In a concurring opinion in Terry, Justice White indicates that in connection with an investigatory stop, although a police officer could ask "pertinent questions", the suspect could not be required to answer, and refusal to answer could not serve as the basis for arrest. The reference to "pertinent questions" in this concurring opinion, however, read in context, refers to questions relevant to the suspected criminal activity which formed the basis of the investigatory stop and which would

constitute "interrogation" under Miranda. In such circumstances, both Miranda and the Fifth Amendment would prohibit a requirement that a suspect answer. However, there is no indication that the Terry court considered the issue of whether an individual can be required to answer neutral biographical questions in the context of a lawful Terry stop.

It is generally desirable for all concerned--the public, the criminal justice system, and the arrested individual--that the identity of persons lawfully arrested or detained by police officers be known. As Justice Holmes said long ago:

> Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

Missouri, Kansas & Texas. Ry. Co. v. May, 24 S.Ct. 638, 639 (1904).

Moreover, public policy strongly supports a requirement that a lawfully detained individual identify himself. The identity of persons arested or detained is important to the entire criminal justice system. This is especially true when police officers take an individual into custody, since police officers are then responsible for the detained individual's safety and well-being. Similarly, identity is very important to the issue of pre-trial release.

Carefully examining the intrusive character of Texas Penal Code Section 38.02 in the context of both its application in this case and also established constitutional principles, it is the opinion of this Court that Texas

Penal Code Section 38.02 does not violate the Fourth Amendment.

III. CONCLUSION

Although Texas Penal Code Section 38.02 was before the Supreme Court in Brown v. Texas, 99 S.Ct. 2637 (1979), the Court resolved the case without reaching the issue of the constitutionality of the statute in the context of a lawful stop. The Court indicated its awareness of the question, but gave little guidance in resolving the issue.[1]

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[1]The United States District Court for the Southern District of Texas, reversed on jurisdictional grounds, addressed the issue of the constitutionality of Texas Penal Code Section 38.02 in the context of a lawful arrest or lawful investigatory stop but reached a conclusion different from the one reached here. Spring v. Caldwell, 516 F.Supp. 1223 (S.D. Tex. 1981), rev'd 692 F.2d 994 (1982).

It is the conclusion of the Court that a lawfully detained or arrested individual has no constitutional right to refuse to answer typical biographical questions which are not reasonably likely to elicit an incriminating response. In this context, such ministerial questions do not constitute interrogation under Miranda, are not incriminatory in a Fifth Amendment sense, and do not unreasonably interfer with an individual's right to personal security and privacy. Under such circumstances, the balance between public interest and individual privacy has been struck in favor of public interest either because of probable cause or reasonable suspicion. To hold that a police officer cannot require an individual to identify himself under such conditions would place an unjustified burden on the criminal justice system.

Consequently, it is the opinion of the Court that, in this case, the plaintiff had no valid constitutional claim based upon an alleged right not to disclose his name to a police officer who had lawfully stopped or arrested him. It is the finding of the Court that the questions which formed the basis of plaintiff's complaint were, in all relevant parts, neutral and biographical in nature and not interrogative in a constitutional sense. For these reasons, the Court did not submit additional interrogatories to the jury regarding alleged constitutional violations associated with plaintiff's

refusal to answer questions about his identity.[2]

It is, therefore, the opinion of the Court that Texas Penal Code Section 38.02 is constitutional and that injunctive relief prohibiting the defendants from enforcing the statute should be denied.

Signed this 15th day of October, 1987.

/s/ Paul Brown
United States District Judge

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[2]Federal Courts should avoid constitutional issues that need not be resolved in order to properly decide the matter then before the Court. Ulster County Court v. Allen, 99 S.Ct. 2213 (1979). Although the State of Texas argues at length that plaintiff does not have standing to seek injunctive relief regarding Texas Penal Code Section 38.02, this argument overlooks the necessity of addressing the relevant constitutional issues in order to decide plaintiff's claims for damages. If plaintiff has a constitutional right to stand mute in the face of proper police questions about his identity after a lawful arrest or investigatory stop, plaintiff may have been entitled to additional jury issues in this regard.